

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 97-00124

COUNSEL: THE AMERICAN LEGION

HEARING DESIRED: YES

24 JUL 1998

APPLICANT REQUESTS THAT:

His records be corrected to reflect that he was promoted to the grade of chief master sergeant (CMSgt) during the 94E9 cycle, with a promotion sequence number of 0142, effective and with a date of rank of 1 Apr 95; and that he be given all back pay and allowances.

APPLICANT CONTENDS THAT:

His superiors abused and misused the administrative process by taking adverse administrative actions against him based on a driving under the influence of (DUI) incident off-base. He was exonerated in the off-base incident. Therefore, the cancellation of his promotion to the grade of CMSgt was unjust.

In support of his appeal, the applicant provided a twenty-two page statement, supportive statements, and numerous other documents associated with the matter under review.

Applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS:

Information extracted from the personnel data system (PDS) indicates that the applicant retired from active duty effective 1 Nov 97, in the grade of senior master sergeant. He was credited with 24 years, 5 months, and 13 days of active duty service.

Available documentation indicates that the applicant was selected for promotion to the grade of CMSgt for the 94E9 cycle, with a promotion sequence number of 0142 and an effective date of promotion of 1 Apr 95.

On 4 Feb 95, the applicant went to an off-base promotion party for a co-worker. At the party, he consumed some amount of alcohol and pizza. He became ill and left the party early. While driving home, he was stopped by a [REDACTED] police officer who subsequently arrested him for DUI. The officer's report stated that the applicant was driving 39 miles per hour (mph) in a 30 mph zone, turned with a wide radius, and drifted. The report noted the following physical observations that were indicative of intoxication: The applicant did not stop his vehicle properly, he had a moderate smell of alcohol on his breath, his speech was "fair" and his eyes were bloodshot. The report further noted that the applicant failed three field sobriety tests--the horizontal gaze nystagmus test, the one leg stand, and the walk and turn test. The degree of failure in each of the three tests indicated that applicant probably had a blood alcohol level of 0.10% or more. On the walk and turn, the applicant lost balance during the instructions, stopped while walking, didn't touch heel to toe, stepped off the line, used his arms for balance, and made an improper turn. On the nystagmus test, a test where the officer watches how the subject's eyes follow the movement of an object, the applicant lacked smooth eye pursuit in both eyes and had a distinct nystagmus at maximum deviation. On the one leg stand, the applicant used his arms for balance and put his foot down. The report also indicated that the applicant was provided a blood alcohol content (BAC) breath test which read 0.136%. The maximum legal blood alcohol content level for driving in Kansas is below 0.08%.

On 9 Feb 95, the applicant's commander recommended to 22 ARW/CC that the applicant's promotion to CMSgt be withheld. On 10 Feb 95, the applicant received a letter of reprimand from his commander. On 17 Mar 95, the Commander, [REDACTED] Air Force, [REDACTED] AF/CC) notified the applicant that he was withholding the promotion to CMSgt, because he had been stopped by the [REDACTED] Police Department for exceeding the posted speed limit and erratic driving, the officer noticed a moderate odor of alcohol on the applicant's breath, and because the concentration of alcohol was subsequently measured at .136, greater than the legal limit of .08. The letter stated that the action would remain in effect until the reason which necessitated the withhold action no longer existed and the applicant was recommended for promotion.

In response to the withhold action, the applicant submitted a letter, dated 24 Mar 95. In that letter the applicant stated that he concurred with the actions.

On 9 May 95, [REDACTED] AF/CC notified the applicant that he had considered his submissions and was withholding the promotion, deferring any further decision until after conclusion of the civilian criminal court case.

On 1 Sep 95, the applicant was diagnosed with a hiatal hernia. On 13 Dec 95, he was tried in the Municipal Court of the City of [REDACTED]. He was found not guilty of DUI with a blood

alcohol count over .08, but found guilty of speeding and DUI with a blood alcohol count between .05 and .08.

On 15 Dec 95, the applicant requested that his commander recommend his promotion to CMSgt. In his letter, he stated that, based on the minimal amount of alcohol he had the night of 4 Feb 95, combined with his physical illness (extreme stomach pains, acid reflux, gas and heartburn from a hiatal hernia that was later discovered, he was somewhat impaired from driving that night but was not at or over the legal BAC of .08. The applicant received a letter of support from his supervisor and his commander recommended that he be promoted with a date of rank of 1 Apr 96.

On 6 Jan 96, AF/CC responded to the applicant's request by removing him from the promotion list. The removal was because applicant had operated a motor vehicle while intoxicated and incapable of safely driving a vehicle. The commander stated that the applicant was stopped for driving erratically and speeding, failed a field sobriety test, and was convicted of speeding and DUI. Finally, the commander stated that applicant's conduct convinced him that the applicant did not deserve a promotion.

On 17 May 96, the applicant appealed his conviction to the Eighteenth Judicial District, [REDACTED]. The judge dismissed the charges stating on the Journal Entry the defendant's motion for city's failure to comply with discovery was substantiated.

On 29 May 96, the applicant requested that AF/CC reinstate him to the promotion list.

On 4 Oct 96, the AF/CC successor denied applicant's request without stating the reasons for the denial.

On 21 Oct 96, applicant asked for the reasons for the denial. On 2 Nov 96, AF/CC stated that he denied the applicant's request for reinstatement because he was convinced that, on 4 Feb 95, the applicant operated a motor vehicle while intoxicated or impaired by alcohol and incapable of safely driving a vehicle. He indicated that he was persuaded that the applicant was stopped by the [REDACTED] Police for driving erratically and at an excessive speed and that he failed a field sobriety test. The denial of reinstatement, in short, was based on the applicant's underlying misconduct, not on the conviction which was later dismissed on procedural grounds.

AIR FORCE EVALUATION:

The Office of the Staff Judge Advocate, AFPC/JA, reviewed this application and recommended denial. JA noted that throughout applicant's submissions, he complained that he was not accorded due process in the actions resulting in the loss of his promotion to CMSgt and that the actions were in violation of the double jeopardy clause of the Constitution. According to JA, it was clear from the applicant's submissions that he did not even begin to understand the legal concepts of due process and double jeopardy.

First, the applicant did not grasp the concept that different types of disciplinary actions are accorded different levels of due process. In an administrative forum, the United States Constitution requires that the individual be given notice of the proposed action, an opportunity to respond, and a decision by an impartial individual (that individual can even be the person proposing the action absent a showing of malice or personal bias). Additionally, the individual must also be afforded any statutory or regulatory procedural rights.

It is JA's opinion that the applicant was accorded due process. By his own admission, he was notified of the action, given an opportunity to respond to that action, and the decision was made by a commander that was superior to the commander who initiated the action. The processing of this case followed the procedures in AFI 36-2502, the only due process required by Constitution, statute, or regulation.

The Double Jeopardy clause of the Fifth Amendment to the United States Constitution states "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..." This clause of the Constitution involves criminal prosecution. It stands for the proposition that a state or federal government cannot twice prosecute an individual for the same offense. The clause does not prevent both the federal and state government from criminally prosecuting an individual--an example being the police officers charged with beating [REDACTED] who were prosecuted in separate criminal trials by both the State of [REDACTED] and the United States. Furthermore, double jeopardy does not prevent the exercise of both criminal and administrative sanctions in the same case by the same government (an example would be cases where an individual is court-martialed and, after the court-martial is completed, administratively separated based on the same conduct). Thus, the exercise of administrative actions by the Air Force in a case criminally prosecuted in Kansas is not in conflict with the Constitutional provision against double jeopardy.

JA indicated that the applicant claimed there was insufficient evidence to support the commander's action. In JA's view, this issue forms the heart of applicant's request. The applicant

mistakenly believed that the Air Force was in some way required to base its decisions on the decisions of a third party--the State of [REDACTED]. The applicant's mistaken belief was compounded by his inability to understand other aspects of the various proceedings he has been through.

First, the applicant believed that he has been exonerated by the [REDACTED] courts when, in fact, he never adjudicated the facts of his case to his benefit in a [REDACTED] court. True, the charges against the applicant were dismissed, but they were dismissed not for lack of evidence as he claims, but for a procedural rules violation by the prosecutor. The only adjudication on the merits in the applicant's case resulted in a conviction, and while that conviction was set aside, the evidence supporting it is still open to consideration. All of the matters included in the arresting officer's report were available to the commander to determine administratively whether the applicant was and is fit for promotion.

Second, the applicant believed that the same evidentiary standards should be applied in administrative and criminal proceedings. He did not understand that in an administrative hearing all relevant and material evidence may be considered while in a criminal proceedings strict and complex rules governing the admission of evidence are applied. Even if the judge at the applicant's initial trial did not admit the breath test into evidence, the commander may still independently decide if the breath test is material, relevant and reliable and what weight, if any, the test should be given. In making that decision, the commander considers such things as conflicting and contradictory evidence.

In this case, the commander was obligated to weigh only the evidence presented by the police report and the evidence presented in response by the member. Initially, the applicant raised no defense. In fact, he admitted to wrongdoing, though not specifically to DUI, and begged for mercy based on the financial impact of the withhold action. Next, when the applicant was convicted of a DUI offense, he admitted to being "somewhat impaired" and asked the commander to consider how much he had already lost as a result of his actions. Once again, the applicant did not offer a defense. He did state that the judge did not use the BAC test as evidence and called the arresting officer a liar, but the applicant did not deny guilt, he admitted it. Considering the overwhelming evidence of guilt in the police report; erratic driving, visible signs of intoxication, failed sobriety tests, the contested BAC results; a vague admission of guilt in the applicant's initial response letter; and finally, an unequivocal admission of guilt in the latest letter from the member, how could a commander possibly reach a conclusion other than the one reached by [REDACTED] AF/CC? In JA's opinion, promotion removal was necessary, appropriate, and supported by the facts, and the applicant has offered no viable defense to the evidence.

In his letter, JA indicated that the applicant showed his ignorance of what happened in his case by stating incorrectly "[t]he charges were dismissed because the local authorities had no evidence to support my arrest." In this letter, the applicant first denied guilt and began raising other defenses before his commander for the first time. He attacked the field sobriety test claiming that the terrain had a 15 degree slope, that there were high winds, and below freezing temperatures which affected his performance of the tests. The applicant further claimed, without supporting documentation, that the arresting officer now admits that the weather and terrain conditions could have caused him to fail the field sobriety test.

When the applicant's request to be reinstated was summarily denied, he again raised the issue with the commander. In his letter, he claimed, in clear conflict with his initial correspondence, that he has always maintained his innocence. The [redacted] AF commander wrote in response that he was convinced that the applicant operated a motor vehicle while intoxicated or impaired by alcohol and incapable of safely driving a vehicle and failed a field sobriety test. The commander stated that the removal was based on the underlying misconduct, not on the conviction. In JA's opinion, the commander correctly assessed the situation.

JA stated that the applicant also argued the removal and withhold actions were unjust based on actions in what he mistakenly believed to be similar cases at [redacted] AFB. He put forth that other individuals who were arrested on [redacted] FB for DUI received different treatment than himself. JA believes the argument is faulty for several reasons.

First, commanders are required to review each case on its unique facts and circumstances, including the background of the Air Force member accused of the offense. Identical punishment for every offense would prove error--an inflexible predetermined punishment, while variation in punishment proves review of each case on the merits.

Second, on-base and off-base offenses are apples and oranges when it comes to comparison. Because of regulatory restrictions, off-base and on-base DUI offenses are and must be treated differently--the Air Force cannot, by regulation, court-martial or offer nonjudicial punishment under Article 15 to a member if state authorities exercise their criminal jurisdiction. In off-base DUI cases, like the applicant's, only administrative actions may be taken. These include letters of reprimand, unfavorable information files, control roster actions, administrative demotions, and promotion withhold and removal actions. Thus, the Article 15 data submitted by the applicant is irrelevant.

Third, the applicant anecdotally cited a non-DUI case involving an officer who was court-martialed while pending promotion. Officer and enlisted cases cannot be compared because they

involve application of different statutes which result in different regulatory and procedural schemes. Comparing officer and enlisted promotion cases is worse than comparing apples and oranges, it is more like comparing apples and cats. Additionally, one cannot compare a case involving solicitation for prostitution and a DUI, they simply are not comparable, According to JA, the applicant did not give them facts to compare, he gave them anecdotes.

Fourth, for the Board to make any reasonable comparison, the applicant would have to provide data on senior noncommissioned officers awaiting promotion who were arrested for DUI off-base, and who had their civilian criminal case dismissed on a technicality without a favorable finding on the merits. He has not provided that type of information and, even if he had, the commanders involved would have to be accorded wide latitude in disciplinary actions because each case must be judged on its own merits. In other words, if some or even all the other similar NCOs were allowed to be promoted, that in and of itself, would not be conclusive evidence of injustice to the applicant. Adverse action is a matter of command discretion, and commander's must be allowed a reasonable range of action within the permissible parameters. In JA's opinion, the applicant's case is clearly within those parameters.

JA stated that promotion propriety actions are discretionary acts by a commander. A promotion authority makes the decision whether an individual is fit to assume a higher grade based on a preponderance of the evidence, a more likely than not standard. The test to apply to determine whether discretion has been abused is whether any evidence exists from which a reasonable commander could conclude that it is more likely than not that the member did the alleged conduct and therefore the member is not fit to assume the higher grade. The question to be answered in this case is: "Is there any evidence to support a finding by a preponderance of the evidence that the applicant drove erratically, at excessive speed, and while impaired by alcohol?" It is JA's opinion that there is sufficient evidence in the police report to support the promotion authority's decision. Additionally, there is the applicant's chameleonesque adaptation of his defense in this case which indicates that his truthfulness has been of less than what a commander might expect from a CMSgt.

According to JA, the procedures set forth in the applicable Air Force regulations were followed in this case, that the evidence supported the actions taken, and that there was no legal error or injustice in this case.

A complete copy of the JA evaluation is at Exhibit B.

The Airman Promotion Branch, AFPC/DPPPWB, reviewed this application and recommended denial. According to DPPPWB, the Major Command (MAJCOM), Field Operating Agency (FOA), or Direct

Reporting Unit (DRU) Commander promotes to the grades of senior and chief master sergeant. This authority may be delegated to the Vice Commander, Staff Director, Director of Personnel, or Numbered Air Force. Based on the applicant being initially charged with driving under the influence of alcohol, speeding, and erratic driving by the [REDACTED] police, his immediate commander recommended to the 22nd ARW Commander that his tentative promotion be placed in a withhold status. On 17 Mar 95, the applicant's promotion authority (Commander, [REDACTED] Air Force [REDACTED] AF/CC) notified him that he was withholding his promotion to chief master sergeant. When the charges against the applicant were dismissed based on a procedural technicality, his immediate commander sent a request to the promotion authority on 21 Dec 95 asking that he be allowed to assume the grade of chief master sergeant with a date of rank of 1 Apr 96, not 1 Apr 95, which would have been his date of rank under normal circumstances. His request was denied and the applicant's tentative promotion was canceled by the promotion authority. On 4 Jun 96, the applicant's new immediate commander forwarded a letter to the [REDACTED] ARW/CC indicating the applicant was appealing the decision by [REDACTED] AF/CC denying him his tentative promotion to chief master sergeant. This request was forwarded to the new [REDACTED] AF/CC who denied his request for reinstatement of his promotion on 4 Oct 96. The reason cited by [REDACTED] AF/CC for canceling his promotion was underlying misconduct and not the initial conviction which was later dismissed on procedural grounds. Because the applicant was not meeting the stringent standards required of a Senior Noncommissioned Officer, the canceling of his tentative promotion by [REDACTED] AF/CC was appropriate and within the intent of AFI 36-2502 which is the governing directive for enlisted promotions.

A complete copy of the DPPPWB evaluation is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Counsel indicated that they believe that the applicant's extensive presentation and the subsequent reviews and advisory opinions of record more than adequately reflected the contentions and considerations in this case. They believe that further issues or argumentation would only be redundant in nature. They are assured that the Board will afford the applicant all due consideration and compassion after a full and sympathetic review.

Counsel's complete response is at Exhibit E.

In his detailed response, the applicant indicated that the AFPC/JA advisory opinion was inundated with opinions and not facts. In addition, it did not cover the other pertinent information he addressed in his appeal because it would have negated their position. In the applicant's view, the Board must

look at this case from page one all the way through to the last page. If not, then justice will not be done.

Applicant's complete response and additional supporting documentation are at Exhibit F.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application was timely filed.

3. Sufficient relevant evidence has been presented to demonstrate the existence of probable injustice. A majority of the Board noted that the applicant was tentatively selected for promotion to the grade of chief master sergeant. However, after he was charged by civilian police with DUI, speeding, and erratic driving, his promotion was withheld pending conclusion of his court case. After he was found guilty of speeding and DUI with a blood alcohol count less than the legal limit, his name was removed from the promotion list. The applicant appealed his conviction and the charges against him were dismissed on procedural grounds. As a result, he requested that the promotion authority reinstate his promotion. However, the promotion authority denied his request, indicating that, despite the dismissal on procedural grounds, he was convinced that the applicant had committed the alleged offenses. Inasmuch as no evidence has been presented which totally convinces the Board majority that the applicant did not commit the alleged offenses, it is not inclined to reinstate the applicant's promotion to his original date of rank. Notwithstanding his guilt or innocence, by his own admission, he showed poor judgment, and demonstrated a lack of appreciation for the responsibilities and obligations imposed on him as a senior noncommissioned officer. Nevertheless, in view of the applicant's lengthy outstanding performance history, the recommendation of his superiors that he be allowed to assume the higher grade, and to remove the possibility of an injustice, the Board majority recommends that the applicant records be corrected to reflect that he was promoted to the grade of chief master sergeant effective and with date of rank of 1 Apr 96 - the date recommended by his supervisor and commander in response to his 15 December 1995 request to assume the rank of chief master sergeant. In agreement with the rationale expressed by the commander, it is the opinion of the majority of the Board that such action affords the applicant proper and fitting relief.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that he was promoted to the grade of chief master sergeant (E-9) effective and with date of rank of 1 Apr 96, and that he was relieved from active duty on 31 Oct 97 and retired for length of service, effective 1 Nov 97, in the grade of chief master sergeant.

The following members of the Board considered this application in Executive Session on 10 Mar 98, under the provisions of AFI 36-2603:

Ms. Patricia J. Zarodkiewicz, Panel Chair
Mr. Kenneth L. Reinertson, Member
Ms. Olga M. Crerar, Member

By a majority vote, the Board voted to correct the records, as recommended. Ms. Crerar voted to deny the appeal but did not wish to submit a minority report. The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 14 Jan 97, w/atchs.
- Exhibit B. Letter, AFPC/JA, dated 19 Mar 97.
- Exhibit C. Letter, AFPC/DPPPW, dated 25 Mar 97, w/atch.
- Exhibit D. Letters, SAF/MIBR, dated 7 Apr 97.
- Exhibit E. Letter, counsel, dated 17 Apr 97.
- Exhibit F. Letter, applicant, dated 22 Apr 97, w/atchs.


PATRICIA J. ZARODKIEWICZ
Panel Chair



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office of the Assistant Secretary

24 JUL 1998

AFBCMR 97-00124

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

The pertinent military records of the Department of the Air Force relating to [REDACTED] directed to show that he was promoted to the grade of chief master sergeant (E-9) effective and with date of rank of 1 Apr 96, and that he was relieved length of service, effective 1 Nov 97, in the grade of chief master sergeant.


JOE G. LINEBERGER

Air Force Review Boards Agency